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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COMMUNITY SCIENCE INSTITUTE et al., Plaintiffs and Appellants, v. COUNTY OF IMPERIAL et al., Defendants and Respondents; PYRAMID CONSTRUCTION AND AGGREGATES, INC., Real Party in Interest and Respondent.	D073676 (Super. Ct. No. ECU09723)

APPEAL from a judgment of the Superior Court of Imperial County, L. Brooks Anderholt, Judge. Affirmed.

Lozeau Drury and Richard Drury, Rebecca Davis; Law Office of Jonathan Weissglass and Jonathan Weissglass for Plaintiffs and Appellants.

Gatzke Dillon & Ballance and David P. Hubbard, Stephen A. Sunseri, Andrew R. Contreiras; Ewing Johnson & Graves and Charles G. Johnson, Vance B. McAlister for Defendants and Respondents and Real Party in Interest and Respondent.

Pyramid Construction and Aggregates, Inc. (Pyramid Construction) proposed to build an asphalt plant on part of an abandoned mine property where Pyramid Construction had permission to remove rock aggregates for construction projects. Imperial County, California (the County), the lead agency, concluded the project would have no significant impact on the environment; therefore, it issued a negative declaration and did not prepare an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA; Pub. Resources Code,[1] § 21000 et seq.; Cal. Code Regs., tit 14, § 15000 et seq.; hereafter CEQA Guidelines). The County granted Pyramid Construction a conditional use permit to build and operate the asphalt plant. Appellants Community Science Institute and John Norton filed a petition for writ of mandate under Code of Civil Procedure section 1094.5, which the superior court denied.

Appellants contend: (1) the County was required to prepare an EIR because there was a fair argument based on substantial evidence that the asphalt plant may result in significant biological effects; specifically, no traffic analysis was conducted to determine the traffic's effects on desert tortoises and other special status species found near the project, and no study showed the asphalt plant's effects on wildlife movement patterns; (2) the asphalt plant's air emissions would significantly affect air quality, as the projected emissions would exceed the significance threshold for nitrogen oxides (NOx) under CEQA, and Pyramid Construction's purchase of the wrong offset credits was unavailing; and (3) the County should have prepared at least a mitigated negative declaration. We

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1 Undesignated statutory references are to the Public Resources Code.

conclude the court did not err by denying the petition for writ of mandate, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

To understand the County's actions in approving the 2018 asphalt plant, we first explain the 2008 Environmental Assessment (EA) of the Pyramid Construction rock mining project.

A. *Rock Mining Project*

In 2007, Pyramid Construction, under the name "American Girl Operation," won a competitive contract to process stockpiled waste rock material generated from a former gold mining operation on public land in Westhaven, which is located in the eastern part of the County. The rock materials are sold locally as construction aggregate. As part of its competitive bid, Pyramid Construction submitted a final "Plan of Operations" stating that "[t]he anticipated maximum daily trip-count for aggregate trucks is 250."

Pyramid Construction also addressed the rock mining project's impact on threatened species: "The desert tortoise, a federally and state-listed threatened species, is not known to occur in the project area; however, desert tortoise[s] are known to occur about 2.5 miles north of the project site, according to the U.S. Fish & Wildlife database. Tortoises were not observed during the 2008 field survey. Because the project site is too disturbed and lacks appropriate burrowing and foraging habitat, desert tortoise[s] are not expected to occur on the project site or proposed well locations. It is possible; however, that desert tortoise[s] may traverse the access road area leading to the mine site. [¶] The project site provides potential foraging habitat for raptors. However, suitable habitat for

tree-nesting or cliff-nesting raptors does not occur on site as the trees present on the property are not tall enough to provide adequate protection for raptor nests. [¶] Mitigation measures will be designed and enforced at [the] proposed [American Girl Operations site] to prevent on-site impacts to bats and desert tortoises by [American Girl Operations] personnel operating on site. These measures include education and avoidance."

The United States Department of the Interior, Bureau of Land Management (BLM) was required to approve an EA in coordination with different federal, state and local agencies and in compliance with their various regulations. A report prepared in connection with the BLM's EA states: "The purpose of this project is to allow production of mineral materials in eastern Imperial County. . . . The proposed [project] would mine existing overburden stockpiles remaining at the site and process these materials for sale as construction in the local Imperial County market. . . . [A]dditionally, the material mined and marketed from this property would supplement the dwindling supply of aggregate in Imperial County. . . . [¶] The project objective is to remove all saleable resources from the waste stockpiles within the contract period, for a minimum of two years and up to 10 years, depending on market conditions." Another section of the report addressing "cumulative impacts" states: "Mineral material markets are highly transportation dependant [*sic*]. . . . It is expected that because of the remoteness of both the proposed Granite and Pyramid operations at the Padre-Madre site, most material products would be directed to special need projects within the region and not compete with usual construction demand in local Imperial markets centered in and around El

Centro and Brawley." BLM stated in its EA that the contract was for removal of an initial 500,000 tons of waste rock from an old mine site, with an option to extend the term to include another 500,000 tons. The BLM projected that "a maximum of 250 truck trips per day (25 trucks at 10 trips per day) is projected during periods of peak activity."

Helix Environmental Planning, Inc. conducted a biological survey of the site (Helix Report) and stated no sensitive species were observed during the site visit. It concluded: "The desert tortoise, a federal and state listed threatened species is not known to occur in the project area . . . ; however, the project site is within the historic desert tortoise range and desert tortoise[s] are known to occur north of the site. Because the project is too disturbed and lacks appropriate burrowing and foraging habitat, desert tortoise[s] are not expected to occur on the project site."

In 2009, BLM made a finding of no significant impact, concluding the rock mining project would not result in significant environmental impacts either individually or cumulatively with other impacts in the general area. Thus, BLM concluded no environmental impact statement was required under the National Environmental Policy Act of 1969. BLM further concluded the proposed project's beneficial effects included that it "would provide a source of aggregate products for Eastern Imperial County. The project would reduce, reuse, and reclaim or recycle rock from the former Padre-Madre Mine, thus removing piles of rock and restoring the area to near-original surface contours. Removal of these piles would promote revegetation and increase accessibility of this area to wildlife." To reduce the likelihood of impacts to natural resources, BLM

mandated that Pyramid Construction comply with a series of measures aimed at protecting the desert tortoise and its habitat, as well as birds and bats.[2]

Separately, Pyramid Construction was required to obtain a reclamation plan and conditional use permit from the County, which approved the rock mining project under a "mitigated negative declaration." (Capitalization and emphasis omitted.) The County's Planning and Development Services Department's 2008 project report stated, "Pyramid [Construction] is currently proposing to permit a 40[-]acre aggregate mining operation of land . . . . The parcel is managed by BLM[,] who has awarded Pyramid [Construction] a contract through competitive bidding to mine the aggregate resources remaining on the parcel as a result of the previous gold mining. The contract will be for a period of ten years and anticipated daily truck trips [are] projected to be 250."

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[2] Pyramid Construction must take the following measures, among others, to protect the desert tortoise: "The authorized biologist shall be required on-site during the initial construction activities. This biologist shall have authority from the operator to halt any action that might result in harm to a desert tortoise. [¶] Post-construction, the authorized biologist shall be required to be available on any day at any time during work hours, to respond to a request from the applicant or BLM to translocate a desert tortoise in harm's way. Annual summaries of desert tortoise sightings, mortalities, and burrows shall be provided to BLM and to the [Fish and Wildlife Service (Service)] in accordance with the requirements of the Small Mining Biological Opinion. [¶] The area of disturbance shall be confined to the smallest practical area, considering topography, placement of facilities, location of burrows, public health and safety, and other limiting factors. Work area boundaries shall be delimited with flagging or other marking to minimize surface disturbance associates [*sic*] with vehicle straying. Special habitat features, such as burrows, identified by the qualified biologist shall be avoided to the extent possible."

B. *The Asphalt Plant*

In November 2015, Pyramid Construction sought a permit from the County's Air Pollution Control District (APCD) to construct and operate a portable hot mix asphalt batch plant (HMA) that would include a baghouse, drum mixer, incline conveyor, two asphalt cement tanks, a cold feed bin, control house, and an 80-ton load out silo. Additionally, Pyramid Construction would install a Pugmill plant, a 1,000-gallon water tank, a fully portable silo to store lime, an enclosed rotary vane feed, and two enclosed conveyors. Pyramid Construction stated in its permit application: "With the addition of the hot plant at American Girl truck traffic wi[ll] not increase because asphalt aggregates that are currently hauled off will be processed in the asphalt plant on site. Therefore there is no additional truck traffic and we will be able to stay below our daily threshold which is 250 truck loads. The maximum existing truck traffic will be adhered to during this project. . . . The distance from the American Girl Mine to Interstate 8 is approximately 6 miles. This plant will be supplying asphalt for an 8[-]mile section which begins 5 miles east of Ogilby [R]oad."

A staff report prepared for a County's Planning Commission meeting stated the conditional use permit was only authorized for that specific asphalt plant, which would be approved for a two-year term, after which it had to be completely removed from the site. The maximum authorized daily truck trips is 250.

APCD's staff evaluated the asphalt plant for anticipated emissions of different pollutants. The staff report stated: "The [] County is in non-attainment for ozone and PM10 [particulate matter]. . . . The offsetting threshold for these pollutants is 137 lbs.

per day, where exceeding [potential to emit emissions] will have to offset the difference. The project has a combined potential emissions of 164.80 lbs. per day of NOx and 206.79 lbs. per day of PM10, the applicant will be required to offset any emissions over 137 lbs. per day. [¶] Rule 207.C.1 requires Best Available Control Technology (BACT) for any new or modified permit unit which emits, or has the potential to emit, 25 lbs./day or more of any nonattainment air pollutant or its precursors." The APCD concluded the asphalt plant was BACT compliant.

The same topic of potential emissions was addressed by the County Planning & Development Services Department in responding to public comments from Laborers International Union of North America, Local Union No. 1184 members (LIUNA): "The proposed Project is an industrial project consisting of a hot mix asphalt (HMA) plant. Although the proposed HMA plant is *portable*—meaning that it can, if necessary, be dismantled and moved to another location—it is not a *mobile* source of emissions, as that term is used in the [APCD's] CEQA Handbook, because it does not generate emissions while moving; it only generates emissions when assembled and stationary."

The APCD concluded that the proposed HMA plant is governed by "Rule 207, which sets a threshold of 137 ppd [pounds per day] for both NOx and PM-10. The [initial study/ negative declaration] indicates that the proposed HMA plant, when combined with the existing sand and gravel mining operation at the American Girl site, has the potential to emit 164.81 ppd of NOx and 206.79 ppd of PM-10. Under Rule 207, any NOx or PM10 emissions over 137 ppd must be offset at a 1.5:1 ratio. For the

proposed Project, this equates to 33.37 ppd of offsets for NOx and 83.74 ppd of offsets for PM-10." (Footnote omitted.)

The APCD gave Pyramid Construction three options for satisfying the Rule 207 offset requirement for the asphalt plant's NOx emissions. Pyramid Construction selected one allowing it to buy Total Organic Compound (TOC) offset credits.[3] In March 2016, Pyramid Construction purchased Rule 207 offsets that APCD mandated. The APCD concluded that because the asphalt plant complied with both the offset and BACT requirements of Rule 207, there was no significant air quality impact.

APCD sent its preliminary decision to the U.S. Environmental Protection Agency for review, and the EPA did not reject it.

Separately, Pyramid Construction applied for a conditional use permit from the County for the asphalt plant. In the County's initial study's "Project Summary" section, it states: "If approved the asphalt plant will provide asphalt to the CALTRANS I-8 Resurfacing Project." The proposed project was environmentally assessed and reviewed

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3 Rule 207 states: "Prior to the issuance of a Permit to Operate[,] Pyramid Construction . . . shall surrender to the [APCD], Stationary PM10 Emission Reduction Credits equal to the amount of 3.37 tons, and Stationary NOx Emission Reduction Credit equal to the amount of 1.67 tons. [¶] or [¶] Prior to issuance of a Permit to Operate and before January 1st of each consecutive year, Pyramid Construction . . . shall surrender to the [APCD], Agricultural PM10 Emission Reduction Credits equal to the amount of 5.61 tons, and Agricultural NOx Emissions Reduction Credits equal to the amount of 2.09 tons. [¶] or [¶] Prior to issuance of a Permit to Operate and before January 1st of each consecutive year, Pyramid Construction . . . shall surrender to the [APCD], Agricultural PM10 Emission Reduction Credits equal to the amount of 5.61 tons, and Agricultural TOC Emissions Reduction Credits equal to the amount of 2.78 tons."

by the Environmental Evaluation Committee consisting of seven members: the director of Environmental Health Services, the County's fire chief, the agricultural commissioner, the air pollution control officer, the director of the Public Works Department, the County sheriff, and the director of Planning and Development Services. The staff report recommended the project be accorded a negative declaration.

The County analyzed the asphalt plant's air emissions and concluded the asphalt plant would not generate new or additional truck traffic. Initially, it was contemplated that Pyramid Construction would submit a traffic study to the County's Department of Public Works to "look at all nearby roadway intersections and corridors and make recommendations for any road improvements including turn lanes [and] traffic signals." However, the County declined to order a traffic analysis after concluding that the asphalt plant would not require Pyramid Construction to exceed 250 truck trips per day.

The County concluded the project would not result in a significant impact on the environment. The County required the mitigation efforts to protect the desert tortoise from moving to the site or migrating through the site to remain in effect, and stated that Pyramid Construction was complying with those efforts. It issued a negative declaration. Dr. Shawn Smallwood, an ecologist, submitted an opinion letter disagreeing with the County's initial study and its conclusion that the project would have less than significant impacts on biological resources. Dr. Smallwood stated in a follow-up letter that an "EIR is needed to appropriately assess the project's potential impacts on burrowing owl and other species, and how to mitigate those impacts." After a public hearing, the County's Planning Commission approved the project.

LIUNA appealed the County's decision, and the County Planning and Development Services office held public hearings on the matter. The appeal was denied and the APCD granted Pyramid Construction a conditional use permit to operate the asphalt plant.

Appellants filed a petition for writ of mandate challenging the County's decision to permit the asphalt plant to operate without preparing an EIR or mitigated negative declaration, and claiming that decision violated CEQA. Appellants also sought a preliminary injunction to halt all activity related to the asphalt plant that would change or alter the physical environment until the County prepared an EIR. The court denied the preliminary injunction and the petition for writ of mandate.

The court concluded the record did not support appellants' contention that the asphalt plant could adversely affect special status species such as desert tortoise, burrowing owl and bats. It instead found that the record supported the County's determination the asphalt plant would have less than significant impact on the environment. Pointing out that Dr. Smallwood had not visited the site, the court stated Dr. Smallwood "had too limited a foundation for expressing a credible opinion on conditions at the property." The court added that his letter "does not reflect a review of the HELIX [R]eport or the BLM mitigation measures that were derived from it. . . . [He] never opined the HELIX survey was in error or outdated, nor did he assert the BLM mitigation measures were inadequate."

The court rejected as unsupported petitioners' argument that the 250 truck trips per day limit set forth in the 2008 conditional use permit did not reflect actual conditions on

the ground and therefore could not be used as the analytical baseline for the county's air quality analysis. The court concluded: "[T]he plant will not increase truck trips over existing conditions, regardless of how many trucks are entering and leaving the American Girl site on any given day. . . . This is because some of the trucks currently assigned to haul aggregate to Heber will now be reassigned to haul finished asphalt directly from American Girl to paving jobs in east Imperial County, resulting in no net increase in truck trips. . . . Thus, the *actual* number of truck trips on a given day does not matter, as the asphalt production operation will not add to that daily truck figure." The court pointed out: "The location of the plant at the American Girl site allows Pyramid [Construction] to reduce the total number of truck *trips* and *truck* miles necessary to serve east [C]ounty paving jobs. . . . Without the Plant, Pyramid [Construction's] trucks must haul aggregate from the American Girl site to the Heber asphalt plant some 55 miles to the west, and then truck finished asphalt from Heber back across the [C]ounty to paving jobsites in the east. The trucks then return to American Girl for more aggregate. . . . Due to the current closure of I-8, this haul route is approximately 160 miles long round trip. . . . [¶] With the operation of the Plant at American Girl, there would be no need to haul aggregate to Heber and then truck the finished asphalt product back to the east, as the asphalt is mixed at American Girl and then trucked directly to the east [C]ounty jobsites. This substantially reduces truck miles and truck emissions."

The court found "no support for Petitioners' argument that the Rule 207 offsets fail as mitigation because they do not reduce the Plant's NOx and PM-10 emissions to 'baseline levels.' " The court concluded, "The APCD and the County therefore

reasonably concluded that the Rule 207 offsets would adequately mitigate the Plant's direct source emissions of NOx and PM-10." The Court concluded that both APCD and the County properly gave Pyramid Construction the option of mitigating its NOx emissions by purchasing TOC offset credits.

DISCUSSION

I. *No EIR Required*

A. *Applicable Law and Standard of Review*

The California Supreme Court has set forth the applicable principles underlying CEQA: " 'In CEQA, the Legislature sought to protect the environment by the establishment of administrative procedures drafted to "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions." ' [Citation.] At the 'heart of CEQA' (CEQA Guidelines, § 15003, subd. (a)) is the requirement that public agencies prepare an EIR for any 'project' that 'may have a significant effect on the environment.' [Citations.] The purpose of the EIR is 'to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.' (Pub. Resources Code, § 21061.) The EIR thus works to 'inform the public and its responsible officials of the environmental consequences of their decisions before they are made,' thereby protecting ' "not only the environment but also informed self-government." ' [Citations.] [¶] Under CEQA and its implementing guidelines, an agency generally conducts an initial study to determine 'if the project may have a

significant effect on the environment.' (CEQA Guidelines, § 15063, subd. (a).) If there is substantial evidence that the project may have a significant effect on the environment, then the agency must prepare and certify an EIR before approving the project. [Citations.] On the other hand, no EIR is required if the initial study reveals that 'there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment.' (CEQA Guidelines, § 15063, subd. (b)(2).) The agency instead prepares a negative declaration 'briefly describing the reasons that a proposed project . . . will not have a significant effect on the environment and therefore does not require the preparation of an EIR.' [Citations.] Even when an initial study shows a project may have significant environmental effects, an EIR is not always required. The public agency may instead prepare a mitigated negative declaration (MND) if '(1) revisions in the project plans . . . before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.' " (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944-945.)

"In CEQA cases, as in other mandamus cases, 'we independently review the administrative record under the same standard of review that governs the trial court.' [Citations.] We review an agency's determinations and decisions for abuse of discretion. An agency abuses its discretion when it fails to proceed in a manner required by law or there is not substantial evidence to support its determination or decision. [Citations.]

'Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements" [citation], we accord greater deference to the agency's substantive factual conclusions.' " (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 275 (*Preserve Wild Santee*); *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 11-13.)

"[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." (CEQA Guidelines, § 15064, subd. (f)(1); see *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.) For example, "[i]f there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR." (CEQA Guidelines, § 15064, subd. (g).) "The fair argument standard creates a 'low threshold' for requiring an EIR, reflecting a legislative preference for resolving doubts in favor of environmental review." (*Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 576.)

This court has stated the standard of review in cases involving a negative declaration: "The hearing officer's 'decision to issue a negative declaration in connection with [a project] is reviewed for "prejudicial abuse of discretion," which "is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." ' [Citation.] ' "In reviewing the

adoption of [a negative declaration], our task is to determine whether there is substantial evidence in the record supporting a fair argument that the Project will significantly impact the environment; if there is, it was an abuse of discretion not to require an EIR. [Citation.] ' "Whether a fair argument can be made is to be determined by examining the entire record." ' [Citation.]" [Citation.] "Although our review is de novo and nondeferential, we must give the lead agency the benefit of the doubt on any legitimate, disputed issues of credibility." ' " (*Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 192-193.)

"Substantial evidence for CEQA purposes is 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.' [Citation.] Substantial evidence includes 'facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.' [Citation.] It does not include argument, speculation, unsubstantiated opinion or narrative, clearly erroneous or inaccurate evidence, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment." (*Preserve Wild Santee, supra*, 210 Cal.App.4th at pp. 275-276.) In determining whether substantial evidence supports a finding, we may not reconsider or reevaluate the evidence presented to the administrative agency. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego, supra,* 196 Cal.App.4th at pp. 522-523; CEQA Guidelines, § 15384).

B. *The Project's Collision Related Impacts on Special Status Species*

Appellants contend the County was required to prepare an EIR because there is a fair argument based on substantial evidence that the asphalt plant may have significant environmental effects. They specifically cite Dr. Smallwood's opinion that the asphalt plant project posed significant vehicle collision hazards to many wildlife species, pointing to a study analyzing the frequency of road-kill and injured animals, including special status species, in Contra Costa, California. They reject the County's reliance on the Helix Report's statement that there are no special status species on the project site. Appellants argue, "As an initial matter, given that the question before the County was the effect of *traffic*, it does not matter whether there are special-status species actually *on* the Project site. By necessity, traffic will pass *near* the site in coming to and exiting the site. As Dr. Smallwood notes, 'the species likely occurring on the roads in the area' would be a necessary component of determining the effect of trucks.' " Appellants conclude that because the Helix Report stated that special status species are found near the mining site, "[t]hat is enough to create a fair argument that the location of special-status species is such as to require an EIR into the effect of vehicle collisions with wildlife (assuming the traffic may have a significant effect . . .)." They argue without adducing supporting facts, "Given that the [Helix Report] recognized that sensitive species were nearby, relying on that report to justify a conclusion that no species had moved onto the site nine years later is folly." Appellants contend that even if the 2008 Helix Report "had some relevance in 2017, Dr. Smallwood points out that it did not constitute a biological survey."

Preliminarily, we reject the claim that the Helix Report did not involve a biological survey. Its author, biologist Doug Allen, "performed a site reconnaissance on February 5, 2008 to evaluate the biological resources evident at the time and to identify any potential biological limitations for the proposed re-mining operation of the site." He concluded, "No listed plant or animal species were observed on site during Helix's February 5, 2008 site reconnaissance or are expected to occur because of the disturbed nature of the project site."

The only site study in the record, the Helix Report, stated the asphalt plant was on a mine where no special status species were found. It concluded desert tortoises were not expected to be found on the site, which is too disturbed and lacking in appropriate burrowing and foraging habitat. However, the Helix Report acknowledged the mine was within the historic desert tortoise range. For that reason the County required Pyramid Construction to maintain mitigation measures in case desert tortoises were found on the site. The Helix Report provided substantial evidence supporting the County's finding that the asphalt plant would not have a significant impact on special status species.

We are not persuaded by appellants' claim that Dr. Smallwood provided substantial contrary evidence regarding the project's effect on special status species in the vicinity of the asphalt plant. They rely on this statement from Dr. Smallwood: "The proposed project would pose significant vehicle collision hazards to many species of wildlife, but the Initial Study provides no assessment of this impact. The project would add up to 250 truck trips per day. Burrowing owls, desert tortoise and flat-tailed horned lizards will be especially vulnerable to destruction by the added truck traffic needed for

the project. Birds, tortoises and lizards are known to be highly vulnerable to crushing by auto traffic . . . . An EIR should be prepared to address this impact." Dr. Smallwood provides no data supporting his claim that in that area the 250 truck rides will leave those species "especially vulnerable to destruction." Moreover, his last statement is nothing more than a conclusion—that an EIR should be prepared—without supporting facts. It does not rise to the level of substantial evidence. An agency may reject an expert's testimony lacking specificity or failing to adequately explain why the project might cause a significant impact. (*Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 786, and fn. 14 ["This opinion is insufficient to create a fair argument of a significant effect on the environment because a suggestion to investigate further is not evidence, much less substantial evidence, of an adverse impact."].)

The same analysis applies to appellants' reliance on Dr. Smallwood's citation to a truck collision study. Dr. Smallwood acknowledged that although he had previously characterized the 250 road trips as additional, the County clarified the asphalt plant would not add 250 more truck trips. Dr. Smallwood stated: "Regardless of whether the 250 truck trips are additional or continuing, the Initial Study includes no analysis of the impacts of 250 truck trips per day. These truck trips will destroy wildlife, the species and number of which need to be estimated. One recent study in Contra Costa County [citation] found 1,339 road-killed animals (and 23 injured animals) over 15 months of surveys . . . . These fatalities included burrowing owls and other special status species. . . . An EIR is needed to assess the impacts of truck traffic." This statement makes no attempt to explain the relevance of a traffic study done in northern California to the

conditions in Imperial County in southern California. For example, no facts show if a similarity exists between the two regions' population sizes, volume of vehicular traffic or number or variety of special status species.

C. *Lack of Traffic Analysis*

Relying on *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 315, 322 (*Communities for a Better Environment*), appellants contend the County did not properly address traffic considerations because it failed to conduct a traffic analysis to determine the 'baseline' number of truck trips per day that were entering and leaving the site while the project was under consideration. Appellants contend the County cannot simply assume that the existing number of truck trips at the time of the project's evaluation was the same as the maximum capacity of 250 trucks. They speculate, "It is just as plausible that the existing use was a small fraction of 250 truck trips, and the environmental effects at full capacity will be considerable."

This court in *North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94, discussed that distinguishable case: "In *Communities for a Better Environment*, the Supreme Court reversed a regional air quality management district's approval of ConocoPhillips's application to modify a petroleum refinery in a way that would increase operation of four boilers that produced steam for refinery operations, but also emitted nitrogen oxide (a major contributor to smog). [Citation.] The district selected as the project's baseline for nitrogen oxide emissions the amount the boilers would emit if they operated at the maximum level allowed under ConocoPhillips's existing permits, even

though ConocoPhillips had never operated them at that level. [Citation.] Using this baseline, the district concluded the project would not have a significant impact on the environment, even though it was undisputed that the as-modified refinery's emissions would exceed the district's 'significance threshold.' [Citation.] The Supreme Court concluded this was error." (*North County Advocates, supra,* at p. 103.)

In *Communities for a Better Environment*, the California Supreme Court approved a line of Court of Appeal decisions that "concluded the baseline for CEQA analysis must be the 'existing physical conditions in the affected area' [citation], that is, the 'real conditions on the ground' [citations], rather than the level of development or activity that *could* or *should* have been present according to a plan or regulation." (*Communities for a Better Environment, supra,* 48 Cal.4th at p. 321.) Applying this general rule, the court concluded the district's selected baseline was impermissibly "hypothetical" because it was based on maximum permitted operating conditions that were "not the norm." (*Id.* at p. 322.)

Although the California Supreme Court recognized public agencies should " 'normally' " use "existing conditions" as the baseline (*Communities for a Better Environment, supra,* 48 Cal.4th at p. 321), the court also recognized that "[n]either CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule." (*Id.* at p. 328.) "As long as that exercise of discretion is supported by substantial evidence, the courts will not disturb it." (*North County Advocates v. City of Carlsbad, supra,* 241 Cal.App.4th at p. 104.)

Here, the County exercised its "quintessentially [] discretionary determination" (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316), and concluded that the maximum 250-truck trip limit was the appropriate baseline. The evidence showed that baseline was realistic because it was calculated based on the goal of extracting as much as 500,000 tons of rock from the mine initially and removing it from the site in a relatively short period of time. Pyramid Construction's contract was renewable for extracting another 500,000 tons of rocks. Therefore, here, the baseline used was not merely hypothetical. Moreover, appellants have not shown that once the asphalt plant was operational, the 250-truck trip limit would cause a significant effect on the environment. To the contrary, the evidence showed that truck trips would be reduced. As the County stated in response to public comments, "[The asphalt plant] will not be adding any truck trips over existing conditions. This is because the sand and gravel truck trips that currently take place at the American Girl mine actually support the applicant's asphalt production plant at Heber, supplying that plant with the aggregate necessary to make asphalt. Due to the current closure of I-8, the truck trips between Heber and American Girl—the 'Heber Loop'—consist of approximately 162 miles round trip. Once the proposed [asphalt plant] is constructed . . . most if not all of the 'Heber Loop' truck trips will cease. Instead, the trucks will haul the finished asphalt from the American Girl site directly to repaving locations on I-8. Consequently, there will be a gross reduction in truck trips, as well as a reduction in the number of miles each trip takes." Appellants have not shown that the baseline was hypothetical or unrealistic; therefore, we do not disturb it.

D. *The Project's Effects on Wildlife Movement Patterns*

Appellants contend that Dr. Smallwood's statements that the project's location is a place "where concentrated wildlife movement should be expected"; and "[I]f I was asked to quantify wildlife movement in the Cargo Muchacho Mountains during the night, the project site is just the type of site I would select to maximize my observations of wildlife moving through the area" constitute substantial evidence that the project may have a significant effect on wildlife patterns. But those statements, like Dr. Smallwood's other statements previously discussed, are unsubstantiated, as they merely point to possible places he would expect to find wildlife movement. Substantial evidence for CEQA purposes does not include speculation, unsubstantiated opinion or narrative. (*Preserve Wild Santee, supra,* 210 Cal.App.4th at pp. 275-276.)

II. *Air Quality and Nitrogen Oxide Offsets*

Appellants contend the County should have prepared an EIR because there was a fair argument based on substantial evidence that the asphalt plant may have significant effects on air quality. They specifically argue the County improperly focused its attention on air emissions from the asphalt plant, a stationary source that was estimated to generate 164 pounds of NOx per day, while ignoring mobile sources of emissions from truck trips. Appellants disagree with the County's claim the project will not increase the current number of truck trips entering and leaving the site, reiterating that the County was required to consider effects at full capacity of 250 trucks per day, and insisting that an EIR was required to examine the effect on air emissions of increasing truck trips to 250 per day.

Appellants also dispute on five grounds the County's claim that the asphalt plant would result in a gross reduction in truck trips as well as a reduction in the number of miles each trip takes, thus it would not increase mobile emissions. Appellants contend: (1) the asphalt plant is not replacing the Heber plant, and no physical or permit limitations for the project prevent operation of both the Heber plant and the asphalt plant at full permitted limits; (2) whether the asphalt plant may result in reduced emissions many miles down the road to Heber and in Heber is irrelevant to the emissions near the asphalt plant; (3) an increase in truck trips could cause the asphalt plant to emit at least one pound of NOx daily and thereby exceed the 137 pounds per day permissible limit; (4) the asphalt plant will generate mobile source emissions that would not exist without the asphalt plant, including from onsite haul trucks, off-site haul trucks transporting asphalt to the paving site and delivering such materials as propane and asphaltic oil, and employees traveling to the site, thus increasing the NOx limit of 137 pounds per day; and (5) "the Heber plant's permit states that it will obtain material for making asphalt from a different mine in Ocotillo (Not the American Girl East mine). . . . Therefore, the entire premise of the County's argument is mistaken. To the extent the Heber plant was receiving material from the plant in Ocotillo, not from the American Girl East mine, the project would not replace any truck trips to Heber."[4]

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4 In discussing the asphalt plant's greenhouse gas (GHG) emissions, the County Planning and Development Services Department stated: "Truck traffic shall not exceed 250 truck trips per day, as approved in the Reclamation Plan #08-0001. This traffic count includes the aggregate operations, as well as the asphalt plant. Therefore, any GHG

We need not analyze each of those points separately because, as discussed above, a fundamental error undergirding appellants' analysis on each point is that there is a faulty basis for the 250 truck trips per day limit, and that there is a possible discrepancy between the actual conditions on the ground and the maximum daily trips threshold, such that the operation of the asphalt plant does not account for a possible increase in daily truck trips from the actual amount up to the maximum. Appellants further contend that the potential traffic increase cannot be ascertained absent a traffic analysis.

However, as stated above, the County Planning and Development Services Department concluded that the 250 truck trips per day included the aggregate rock operations and the asphalt plant operation, and any greenhouse gas impacts resulting from the combined sources "would be considered less than significant." Moreover, the APCD concluded that the asphalt plant would reduce emissions because its purpose is to

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impacts that may result from the continuation of the mining operation and plant would be considered to be less than significant."

The APCD responded to public comments from LIUNA about its Initial Study (IS) by reaffirming: "[I]t should be noted that the applicant has proposed the Project to more efficiently perform asphalt paving activities associated with Caltrans' Interstate 8 (I-8) repaving program, which was approved pursuant to a CEQA exemption last year and is already underway. [Pyramid Construction] is currently conducting I-8 re-paving operations under its contract with Caltrans, and is doing so by producing asphalt at its existing plant in Heber, California, for which the applicant already has a permit and adequate capacity. The applicant then trucks the asphalt eastward to the identified repaving sites on I-8. The purpose of the proposed asphalt plant at American Girl Road is to locate asphalt production closer to the Caltrans repaving sites, thereby reducing the length of the asphalt truck trips. This, in turn, would reduce the air emissions from those truck trips. If the proposed Project is not approved, the applicant will continue to produce and truck asphalt from its Heber plant pursuant to its existing permits."

locate asphalt production closer to the repaving sites, thus reducing the length of the truck trips and, in turn, reduce air emissions from those truck trips. It added that if the asphalt project were not approved, the 250 truck trips limit would still remain in place. The trial court's analysis also is instructive, as it points out that the asphalt plant makes it unnecessary to haul aggregate rock to Heber and then truck the finished asphalt product back to the east, as the asphalt is now taken directly from the asphalt plant to the east County jobsites, which "substantially reduces truck miles and truck emissions."

Appellants argue that even analyzing solely the stationary emissions, an EIR was still required because the asphalt plant exceeds the CEQA significance threshold for determining whether NOx emissions were significant, as the only applicable standard in effect in the County's CEQA Handbook at the time was 55 pounds per day; instead, the County applied the Rule 207 standard of 137 pounds of NOx per day.

Appellants are incorrect. The APCD's CEQA Handbook section 4.1 sets forth the "[t]hresholds of [s]ignificance for [p]roject [o]perations" and states: "Because the operational phase of a proposed project has the potential of creating lasting or long term impacts on Air Quality, it is important that a proposed development evaluate the potential impacts carefully." Therefore, the Handbook sets out in Table 1 "general guidelines for determining the significance of impacts and the recommended type of environmental analysis required based on the total emissions that are expected from the operational phase of a project." Table 1 sets forth a threshold of 55 pounds per day for NOx emissions. However, section 4.1 expressly exempts industrial development projects from Table 1's threshold, because it regards them as being subject to Rule 207: "For industrial

development projects, the thresholds in Table 1 should be used only to determine significance of the impact from mobile source emissions attracted to the stationary source. Therefore, Table 1 would not be used to determine significance for the air emissions associated with the stationary source, including off-road mobile emissions produced within the stationary source. Those stationary source emissions are already subject to mitigation according to Rule 207, New and Modified Stationary Source Review."

Relying on *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, appellants argue that even if the correct standard for NOx emissions was 137 pounds "the notion that two different thresholds could be applied to a [p]roject's mobile source emissions (55 pounds per day) and stationary source emissions (137 pounds per day) is contrary to the concept of a significance threshold, which is based on the *effect* on the environment, not on the nature of the source." Appellants contend that by the County's calculations, "stationary source emissions of NOx from the project will be exactly 137 pounds per day. If mobile source emissions account for even one pound per day of NOx, the [p]roject's emissions will exceed the level of 137 pounds per day" and "[b]ecause 137 is greater than 55, that should be the end of the matter."

Appellants reliance on *Kings County Farm Bureau v. City of Hanford, supra,* 221 Cal.App.3d 692, is unavailing. That case reiterated the principle that CEQA is "designed to measure all project-related pollution emissions and prohibits the division of a project into parts for purposes of environmental review." (*Id.* at p. 716.) In the context of the power plant at issue in that case, the court there stated: "The project requires the delivery

of coal for fuel. The resulting emissions from truck or train traffic are related to the project and cannot be ignored when determining whether air emissions meet existing standards for purposes of invoking the presumption of no significant impact." (*Id.* at p. 717.)

Here, as stated, the County used the 137 pounds per day threshold under Rule 207 and analyzed the emissions from the stationary asphalt plant. It also contemplated emissions from mobile sources in the form of truck trips to and from the site. However, it concluded that a traffic analysis was not required in light of the fact the project would not increase truck trips, but rather would reduce them. This conclusion was based on the finding that the location of the asphalt plant was closer to the construction repavement site in the east of the County. As the APCD stated in response to public comments, "[Pyramid Construction] is currently conducting [Highway] I-8 repaving operations . . . by producing asphalt at its existing plant in Heber, California . . . . [It] then trucks the asphalt eastward to the identified repaving sites on I-8. The purpose of the proposed asphalt plant . . . is to locate asphalt production closer to the Caltrans repaving sites, thereby reducing the length of the asphalt truck trips." The County also concluded that Pyramid Construction complied with Rule 207 by purchasing offset credits to account for any emissions exceeding the threshold. It further concluded that the asphalt plant employed the best available control technology for addressing emissions. In light of this substantial evidence, the lead agency did not err by concluding based on both mobile and stationary sources that the asphalt plant would not significantly impact the environment through increased emissions.

Appellants argue Pyramid Construction did not purchase the correct NOx offsets but instead purchased offset credits for PM-10 and TOC. Appellants concede "There is no dispute that NOx and TOCs are different pollutants. . . . To be sure, they are both ozone precursors (meaning that they create ozone); for this reason, air districts allow them to offset each other." However, appellants claim that "nothing in CEQA permits reduction in one pollutant to make up for the significant effect of another pollutant. Rather, precedent establishes that compliance with air district standards is not the same as compliance with the more stringent requirements of CEQA."

Despite the parties' dispute regarding whether appellants exhausted their administrative remedies before raising this point on appeal, we obviate that discussion and address the issue on the merits. Pyramid Construction complied with Rule 207 by purchasing TOC offsets, which was one of the options the APCD gave to it, and submitted proof of purchase to the APCD, which allows "interpollutant offsets," including interpollutant trades between PM-10 and PM-10 Precursors, such as TOC.

III. *Mitigated Negative Declaration*

Appellants contend, "Because the County relied on mitigation to find insignificant air effects, the County did not proceed in the manner required by law by failing to prepare at least a mitigated negative declaration."

If " ' "the initial study identifies potentially significant effects on the environment but revisions in the project plans 'would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur' and there is no substantial evidence that the project as revised may have a significant effect on the

environment, a mitigated Negative Declaration may be used." ' " (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 704-705.) The petitioner bears the burden of proof to demonstrate by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 899.)

We conclude the County did not err. The offsets that Pyramid Construction bought and the BACT equipment were put in place before the review process was completed. Those measures demonstrate that the Project's NOx and PM-10 emissions will comply with the threshold set by Rule 207. Therefore, a Negative Declaration and not a mitigated negative declaration is appropriate because the asphalt plant will not result in a significant unmitigated impact on the environment.

DISPOSITION

The judgment is affirmed. The County of Imperial and the Imperial County Board of Supervisors are awarded costs on appeal.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.